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INSIGHTS

DECODING COMPLEXITIES OF INDIA BUDGET 2026-27

FRENCH BUDGET 2026 – OVERVIEW OF SIGNIFICANT PROVISIONS

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AND MORE

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EDITORS' NOTE

In this month's edition of *Insights*, our articles address the following:

- **Decoding the Complexities of India Budget 2026-27.** Nirmala Sitharaman, the Indian Finance Minister, presented Budget 2026-27 on February 1, 2026. It promises significant tax benefits for nonresident investors operating in specific sectors of the economy. Jairaj Purandare, the Chairman of JMP Advisors Pvt. Ltd., Mumbai, Bhakti Shah, a Director of JMP Advisors Pvt. Ltd. in Mumbai, and Siddhita Desai, a Senior Associate at JMP Advisors Pvt. Ltd., Mumbai, take a deep dive into the budget. Highlights include (i) expansion of the preferential time periods for I.F.S.C. and O.B.U. tax benefits, (ii) an exemption for income of a foreign company that arises in India from procuring services from a specified data center in India, (iii) an exemption for income of foreign companies arising from the provision of capital goods, equipment, or tooling to a contract manufacturer in India, (iv) an exemption for overseas income of a nonresident individual for five consecutive tax years where the nonresident visits India for the first time to render services under an approved program, (v) the adoption of a unified 15.5% safe harbor in the Indian transfer pricing rules for providing information technology services with a cap of U.S.$2.2 billion, and (vi) expansion of the benefit of an A.P.A. to cover affiliates of the taxpayer that applied for the A.P.A.
- **French Budget 2026 – Overview Of Significant Provisions.** The French Finance Act for 2026 introduced several measures affecting private wealth structuring and investment strategies. Some provisions were expected and were discussed in previous legislative debates. Others target specific structuring techniques traditionally used for wealth preservation or intergenerational planning. Philippe Stebler, of Stebler Moati Avocats, Paris, explains the tax provisions that were adopted, including (i) the extension of minimum income taxation of 20% for individuals, (ii) adjustments to the tax deferral regime applicable to share-for-share exchanges occurring before cash-outs through holding companies, (iii) the imposition of a new 20% tax is imposed on certain luxury assets held through holding companies, (iv) the exclusion of luxury assets held by companies from the "Dutreil" regime, a major tax relief mechanism for business transfers by gift or inheritance, and (v) an extension of the temporary surtax for large corporations.
- **Portuguese Dividends Paid to European C.I.V.'s – Local Law vs. E.U. Fundamental Freedoms.** The taxation of dividends paid by Portuguese resident companies to nonresident C.I.V.'s has become one of the most litigated and structurally significant issues in Portuguese tax law. What began as a technical discussion concerning the scope of a domestic tax exemption has evolved into a consolidated body of caselaw confirming a structural incompatibility between Portuguese tax legislation and European Union law, in particular the principle of free movement of capital. In his article, António Gaspar Schwalbach of Spear Legal, Lisbon, revisits the Portuguese tax regime applicable to dividends distributed to C.I.V.'s, and addresses the practical consequences for nonresident funds, asset managers, and custodians, including the recovery of withholding tax and indemnity interest.

- ***Tiger Global* Case Denies Treaty Benefits Claimed By Mauritius Companies.** The Supreme Court of India issued a landmark ruling in the case of three Mauritius entities owned by the Tiger Global Group in the U.S. The three entities were private companies incorporated in Mauritius. They were formed to undertake investment activities aimed at long-term capital appreciation and investment income. They were regulated by the Mauritius Financial Services Commission ("F.S.C.") and held Category I Global Business Licenses under the Financial Services Act, 2007. Each held a valid Tax Resident Certificate issued by the Mauritius Revenue Authority, which certified their status as tax residents of Mauritius for income tax purposes. The Indian Supreme Court was unimpressed. The arrangement had the correct form, but in the facts presented, the form lacked economic substance. Abbas Jaorawala, a Senior Director and Head-Direct Tax of Khaitan Legal Associates, Mumbai, explains all.

- **The Final Chapter: Testamentary Instruments For Global Families.** As more families live, invest, and hold assets across multiple countries, estate planning increasingly requires coordination between legal systems that are not designed to work together. A foreign Will, alone, may not effectively administer U.S. assets, while a U.S. Will drafted in isolation can unintentionally disrupt an existing foreign estate plan. An important objective in cross-border estate planning is the creation of complementary structures that minimize probate friction, provide efficient tax planning for beneficiaries, and preserve the client's intended dispositive scheme across jurisdictions. In her article, Allison Dolzani (i) explores several key cross-border testamentary planning considerations for global families with U.S. beneficiaries and U.S. assets and (ii) suggests planning, practical, and logistical guidance for U.S. estate administration of a foreign estate.

We hope you enjoy this issue.

- The Editors

DECODING COMPLEXITIES OF INDIA BUDGET 2026-27

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Tags
A.P.A.
Contract Manufacturing
Data Centers
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O.B.U.

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INTRODUCTION

Nirmala Sitharaman, the Indian Finance Minister, presented Budget 2026-27 ("the Budget") on February 1, 2026. Her ninth consecutive Budget has arrived at a defining "Goldilocks moment" in the Indian economic odyssey. During the current Financial Year[1] ("F.Y."), the Indian economy has been navigating the shifting tides of global volatility, looming tariffs, surging bullion prices, cross border tensions, suspended treaties, regional security threats, and rapid technological disruption.

During F.Y. 2025 26, the Indian economy remained resilient, adaptive and robust, posting a strong Gross Domestic Product growth rate of 7.6%[2] despite global turbulence. As we move through the latter half of this decade, the discussion has evolved beyond resilience. Discussions now reflect a bold, accelerated drive toward achieving the vision of *Viksit Bharat* – a developed India by the centennial of Indian independence.

The reform "express train" that is embodied in the Budget moves full steam ahead to (i) sustain the momentum of structural reforms, (ii) strengthen a robust and resilient financial sector, and (iii) advance cutting-edge technologies, including artificial intelligence applications. Some of the noteworthy policy proposals announced in the Budget are as follows:

- Scaling up manufacturing, especially for semiconductors
- Creating champion small and medium enterprises and supporting micro enterprises
- Development of high-speed rail corridors
- Adapting emerging technologies, including artificial intelligence
- Promoting tourism in India and creating hubs for medical value tourism
- Comprehensive review of the banking sector
- Empowering women through education
- Upskilling and job creation

In essence, the Budget aims to provide a strategic masterplan designed to elevate India and transform it from a developing-country mindset to a leadership mindset, while ensuring that the benefits of progress reach the last mile.

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[1] The Financial Year in India runs from April 1 to March 31.

[2] India's Revised G.D.P. Estimates released on February 27, 2026.

NEW INCOME TAX LAW

As part of an effort to modernize and simplify India's six-decade-old tax law, a comprehensive review of the Income tax Act, 1961 ("Old Act") was initiated in 2024 and the Income-tax Act, 2025 ("New Act") was enacted in August 2025. The New Act will be effective from April 1, 2026.

The New Act is more concise than the Old Act and contains provisions that reflect current realities and the digital age, making the overall language simpler. While the intention has been to preserve the core principles of the earlier law, certain simplifications from a drafting perspective may unintentionally leave room for new interpretations, potentially leading to litigation.

Since the New Act was introduced only a few months earlier, it was widely expected that the Budget would contain limited additional changes. Contrary to the expectation, several amendments have been proposed – some welcome, others more stringent.

Several amendments seek to override adverse judicial interpretations through retrospective clarifications. Retrospective alterations of the law, particularly where courts have already interpreted the statutory framework in favor of taxpayers, dilute the principle of finality of judicial decisions and undermine legitimate expectations formed under the law as it previously stood.

Alongside the New Act, rules and forms under the New Act were recently notified. A preliminary review suggests that while certain proposals move towards stricter compliance and more granular reporting, others reflect a much needed simplification considering evolving business realities.

TAX HOLIDAYS FOR NONRESIDENTS

Units in I.F.S.C.'s and O.B.U.'s

India has made a clear, long-term plan to position itself as a competitive global hub for cross border finance and technology. A central element of this strategy is the International Financial Services Centre ("I.F.S.C.") at GIFT City, India's dedicated jurisdiction designed to host cross border financial services under a specialized regulatory regime. The I.F.S.C. offers a platform for banking, insurance, capital markets, fund management, global treasury operations, aircraft and ship leasing and other internationally focused financial activities, all within a ring-fenced environment intended to match the sophistication of established centers such as Singapore and Dubai.

This policy direction has been supported by broader tax reforms aimed at enhancing India's attractiveness:

- Reductions in corporate tax rates
- Lower withholding rates in select cases
- Simplified compliance for specified categories of taxpayers

As a result, the I.F.S.C. ecosystem has expanded rapidly, with over 1,000 registered entities including global banks, insurers, asset managers and fintech firms.

With the I.F.S.C. Act coming into effect in 2019, a new mechanism was introduced that permitted units to avail themselves of a 10 year tax holiday within a 15 year block. Subject to specified conditions, a unit in an I.F.S.C. earning specified income became eligible for a 100% income tax exemption for any 10 consecutive years out of a 15 year block, beginning from the year in which it received registration under the applicable regulatory statutes. This gave businesses greater flexibility by allowing them to align their tax exempt period with their operational growth and business cycles.

A parallel tax holiday exists for units of scheduled banks or Offshore Banking Units ("O.B.U.'s") of foreign banks operating from Special Economic Zones. These units are entitled to a 100% exemption for ten consecutive years, beginning from the tax year in which the requisite regulatory approval is obtained.

To significantly enhance the competitiveness of India's I.F.S.C. framework and provide certainty to global financial institutions, the Budget proposes a substantial expansion of the tax holiday regime. I.F.S.C. units will now be eligible for a profit linked deduction for 20 consecutive years within a block of 25 years, effectively doubling the incentive period. For O.B.U.'s, the law has been amended to grant exemption for 20 consecutive years, beginning from the tax year in which the requisite regulatory approval is obtained.

"A second aspect of the reform is the introduction of a concessional 15% tax rate on business income for the period other than the tax holiday."

A second aspect of the reform is the introduction of a concessional 15% tax rate on business income for the period other than the tax holiday. Compared with the regular corporate tax rate of 35%/22%, this provides entities with both an extended period of zero tax and a stable, low tax rate otherwise. Together, these amendments reflect India's broader policy vision of establishing a globally competitive financial center and signaling long term stability.

Data Centers

Data centers have become a major global investment destination. The data center industry in India is on the cusp of significant growth, with the cumulative installed capacity projected to rise from the current 1 GW to 14 GW by 2035. Estimated industry data suggests that this incremental growth is expected to require more than U.S. $555 million of capital expenditure by the end of the decade.[3]

Against this backdrop, India aims to strengthen long term digital infrastructure by offering greater tax certainty and a supportive policy framework aligned with its broader vision of *Viksit Bharat* by 2047.

A data center ecosystem includes several participants:

- Infrastructure or colocation providers
- Cloud service providers
- Managed service providers

[3] "India's Data Centre Capacity Set to Touch 14GW by 2035." India Brand Equity Foundation (IBEF), December 30, 2025.

- Application providers
- Resellers
- Network service providers
- Disaster recovery and backup service providers

These facilities require high upfront capital investment, long development timelines, and a stable policy environment. A.I. focused data centers require significant expenditure on specialized computing hardware, power and cooling systems, and skilled technical staff.

To attract and anchor this infrastructure, the Budget proposes an exemption for income of a foreign company that arises in (or is deemed to arise in) India from procuring services from a specified data center in India. The proposal is effective April 1, 2026, and remains through the tax year ending March 31, 2047.

Note, however, that this exemption comes with certain conditions, of which the most important are the following:

- The foreign company must be a company notified by the Indian Government.
- It must not own or operate any of the physical infrastructure or resources of the specified data center.
- All sales to customers located in India must be routed through Indian companies.

For the foreign company to be eligible for this exemption, the specified data center will also have to satisfy certain conditions:

- It must be set up under an approved scheme to be notified by the Government.
- It must be owned and operated by an Indian company.

The nature of operations that the Indian company should undertake must include data center services, which are defined to mean service delivery through physical infrastructure and information technology infrastructure, including servers, storage, operating systems, and related hardware and software.

Overall, the amendment strengthens India's appeal to major cloud and A.I. providers by offering a stable tax environment and tax certainty for a period of two decades, which is required for high capex digital infrastructure. The exemption is poised to accelerate the next wave of developments while reducing the risk of Indian source taxation on eligible receipts.

Export Oriented Electronic Contract Manufacturing

Global manufacturers were hesitant to deploy high value equipment in India because foreign-owned machinery located in the country could be viewed as creating a permanent establishment ("P.E."). This potential P.E. exposure and the resulting risk of Indian taxation on attributable income in India discouraged investment in advanced manufacturing.

Income of foreign companies arising from the provision of capital goods, equipment, or tooling to a contract manufacturer in India is proposed to be exempt, subject to specified conditions. The exemption applies where the following conditions are met:

- The capital goods, equipment, or tooling are provided by a foreign company to a contract manufacturer resident in India.
- Ownership of the capital goods, equipment, or tooling remains with the foreign company even though they are under the control and direction of the contract manufacturer (including arrangements akin to rental or lease).
- The contract manufacturer is located in a customs bonded warehouse in India.
- The contract manufacturer produces electronic goods on behalf of the foreign company for consideration.

This exemption is made available for a period of four years up to F.Y. 2030-31.

Nonresident Individuals

In India, an individual becomes taxable on global income if the individual's residential status under the domestic tax law is that of a resident. In practice, nonresident professionals working in India often become residents after spending about three years in the country. To encourage global talent to visit India and provide specialized services, the Budget has introduced a favorable amendment offering a short tax holiday.

It is proposed that the overseas income of a nonresident individual for five consecutive tax years will be exempt from tax in India where the nonresident visits India for the first time to render services in India under an approved program that is yet to be announced.

TRANSFER PRICING

Safe Harbor Regime for Information Technology Services

A safe harbor is defined in the Indian transfer pricing rules as circumstances in which the Indian tax authorities accept the transfer price declared by the taxpayer if the conditions prescribed in the tax law are fulfilled.

Under the current safe harbor regime for transfer pricing, information technology services are divided into several distinct categories:

- Software development services
- I.T. enabled services("I.T.e.S.")
- Knowledge process outsourcing("K.P.O.")
- Contract R&D services relating to software development

Each category has separate revenue thresholds and differing rates, ranging from 17% to 24% safe harbor margins. However, given the highly interconnected nature of these service lines, this fragmented framework has often resulted in classification disputes that reduce certainty for taxpayers.

Recognizing India's position as a global leader in information technology services, a series of far reaching reforms have been proposed to simplify the safe harbor regime. The key change is the creation of a single, unified category for I.T. services by combining software development services, IT.e.S., K.P.O. and contract R&D services relating to software development. A common safe harbor margin of 15.5% will apply to this consolidated category.

In addition, the eligibility threshold for availing the safe harbor option will be significantly increased from I.N.R. 3,000 million (approximately U.S. $33 million) to I.N.R. 20 billion (approximately U.S. $2.2 billion). To enhance transparency, safe harbor applications for I.T. services will be processed through an automated, rule-driven process, without any requirement for tax officers to examine and accept the application. Once an eligible company chooses for the safe harbor regime, it will be allowed to continue using it for a continuous block of five years, unless the company opts out.

"Recognizing India's position as a global leader in information technology services, a series of far reaching reforms have been proposed to simplify the safe harbor regime."

This has been a long standing demand of the I.T./I.T.e.S. industry, and the proposed amendments are particularly significant. The consolidation of multiple service lines into a single unified category combined with a unified lower rate is a welcome reform that is expected to greatly enhance the ease of doing business. It should also help reduce litigation risk and provide much needed certainty to taxpayers operating in this sector.

Advance Pricing Agreements

Under the current Advance Pricing Agreement ("A.P.A.") rules, only the taxpayer that signs the A.P.A. with the tax authorities is allowed to file a modified return of income to give effect to the outcome of the A.P.A. However, an A.P.A. can result in changes in the income of an associated enterprise ("A.E.") of that taxpayer. The law does not allow A.E. to file a revised return or claim a refund of excess taxes paid. Only the taxpayer that filed the A.P.A. can submit a modified return reflecting the revisions necessitated by the A.P.A. To remove this gap, it is proposed to extend the facility of filing modified returns to the A.E.'s as well.

The proposal provides that when income is modified because of an A.P.A., the taxpayer that entered the A.P.A. as well as the A.E. may file modified returns in line with the terms of the A.P.A. The modified returns must be filed within three months from the end of the month in which the A.P.A. is signed. This provision will apply to A.P.A.'s entered on or after April 1, 2026, and will cover the tax year beginning April 1, 2026, and subsequent years.

In addition, targeted fast-tracking of unilateral A.P.A.'s for the I.T. services sector has been proposed. It seeks to ensure that unilateral A.P.A. applications relating to I.T. services are processed and concluded within a period of two years from the date of application, with a one-time extension of up to six months available at the taxpayer's request.

MINIMUM ALTERNATE TAX

India's corporate tax system is built on the principles of source based and residence based taxation, supported by a wide network of income tax treaties designed to prevent double taxation for cross border investors. Residents are taxed on their worldwide income, while nonresidents and foreign companies are taxed only on income that arises from sources in India.

Foreign companies are taxed at the rate of 35% (plus applicable surcharge and cess[4]), whereas domestic companies are generally taxed at a 30% rate. Domestic companies with turnover up to I.N.R. 4,000 million (approximately U.S. $44 million) are taxed at a reduced rate of 25%. In 2019, a new optional regime was introduced, offering a 22% corporate tax rate for domestic companies that forgo specified exemptions and incentives, and a further reduced rate of 15% for new domestic manufacturing companies, subject to conditions (together referred to as the Concessional Tax Regime).

Within this framework, the Minimum Alternate Tax ("M.A.T.") serves as a safeguard for the Revenue. It ensures that companies showing substantial book profits but paying little or no tax under the regular provisions, often due to incentives or adjustments, still pay a minimum amount of tax. Introduced in 1987, the M.A.T. operates similarly to the U.S. alternative minimum tax. When the tax under normal provisions falls below a fixed percentage of book profits (as defined under the law), M.A.T. applies. The current M.A.T. rate is 15% (plus applicable surcharge and cess). M.A.T. provisions are not applicable to domestic companies that have already opted for the Concessional Tax Regime.

Under the M.A.T. regime, a company compares the income tax payable under the normal provisions with a specified percentage of its adjusted book profit (*i.e.*, the "M.A.T. liability"). If the normal tax is lower than the M.A.T. liability, the company must pay M.A.T., since it represents the higher amount.

When M.A.T. liability exceeds the normal tax, the difference is recorded as M.A.T. credit. Such M.A.T. credit can be carried forward and set off in a subsequent year in which the normal tax liability again exceeds the liability under M.A.T., thereby reducing the cash outflow in that later year. Under the existing provisions, M.A.T. credit could be carried forward for up to 15 tax years, underscoring that M.A.T. operates largely as a timing mechanism, an advance payment against future regular tax liability rather than a permanent tax burden.

The Budget introduced a shift in the corporate taxation landscape by overhauling the M.A.T. framework and treating M.A.T. as the final tax liability. The M.A.T. rate is proposed to be reduced from 15% to 14% for all companies, including foreign companies. M.A.T. credit accumulated up to March 31, 2026, can continue to be carried forward up to a maximum of 15 years, but no fresh credit can be accumulated.

For domestic companies that opt for the Concessional Tax Regime, with effect from April 1, 2026, onwards, the offset of existing M.A.T. credit accumulated up to March 31, 2026, is capped at 25% of the year's normal tax liability. For foreign companies,

[4] A cess tax in India is an additional levy imposed by the central government for specific purposes such as health, education, or infrastructure.

however, M.A.T. credit accumulated up to March 31, 2026, remains usable under the amended rule. It can be offset to the extent of normal tax payable in a later year exceeds the liability under M.A.T.

Further, it is proposed to expand M.A.T. exemptions to nonresidents such as cruise ship operators and certain electronics manufacturing support services, if they opted for the presumptive taxation system. This fixes a long-standing issue for specified foreign businesses and aligns M.A.T. with the original intention of allowing presumptive schemes to simplify compliance burdens for these operators.

Overall, these proposals signal a deliberate move toward eventually phasing out M.A.T. as well to encourage domestic companies to transition to the Concessional Tax Regime. As more domestic companies opt for the Concessional Tax Regime, M.A.T. will naturally become less relevant. This is a positive development, given complexity under M.A.T. and history of disputes.

BUYBACK OF SHARES

The concept of companies repurchasing their own shares originated in the United Kingdom in the early 1980's. Companies generally undertake buybacks either to consolidate promoter or majority control or to distribute excess cash reserves that are not required for business operations.

In India, the Companies Act initially treated a buyback as the release of a company's assets, requiring mandatory approval from the Company Court. Subsequent amendments to the Act introduced a simplified, fast track mechanism that allowed companies to return capital through buybacks without seeking Court approval.

For companies with distributable profits, there are two primary methods of returning value to shareholders, namely, declaring dividends or undertaking share buybacks. The tax treatment of these distribution mechanisms has undergone significant evolution, shaped by various policy shifts. Historically, both dividends and buybacks were taxed at the company level. Whereas now, both dividends and buybacks are generally taxed in the hands of shareholders, reflecting a broader move toward shareholder level taxation of profit distributions.

The taxation of dividends and buyback of shares has undergone frequent amendments in recent years. Earlier, companies distributing dividends in India were required to pay Dividend Distribution Tax ("D.D.T.") at 15% on the amount of dividends declared. During this period, dividends were exempt for shareholders.

In contrast to the dividend regime, where dividends were subject to D.D.T., the net proceeds received by shareholders from a buyback were taxed as capital gains - often at lower rates. Since buybacks did not attract D.D.T., it emerged as a preferred mechanism for distributing surplus profits.

To remove this disparity, the tax law was amended to introduce a buyback tax. Under this regime, companies undertaking a buyback were required to pay tax at a flat rate of 20% on the distributed income, plus applicable surcharge and health and education cess. Correspondingly, income arising to shareholders from the buyback was exempt for the shareholders.

In 2020, the D.D.T. regime was abolished, and dividend income became taxable directly in the hands of shareholders at applicable rates. A similar shareholder-level tax treatment was proposed for buybacks. In 2024, further reforms were implemented to align buyback taxation with the dividend regime. Under the revised framework, buyback proceeds are treated as dividend income taxable in the hands of the shareholder, while the shareholder's original cost of acquisition of the repurchased shares is treated as a capital loss.

Budget Proposals

The Budget amends the tax law by providing that the consideration received by shareholders upon the repurchase of shares will be taxed as capital gains rather than as dividend income. This change seeks to restore the original characterization of buyback proceeds.

Further, recognizing the unique position and influence of promoters in corporate decision-making, particularly relating to buyback transactions, the amendment introduces an additional tax where the repurchased shares are held by promoters. Where a company undertakes the buyback in accordance with the Board/Shareholder approval route as per the Companies Act, 2013, promoters are subject to an additional layer of tax, over and above the rate of normal capital gains The rate of the additional tax varies, depending on whether the gains are short-term or long-term and whether the promoter is a domestic company or not. Under the proposal, the effective rate for domestic company promoters is 22%, whereas promoters that are not domestic companies will be subject to an effective rate of 30%.

The proposed amendment can be viewed as a course correction for non-promoter shareholders, restoring a more equitable tax framework for buyback transactions. The amendment has been broadly welcomed, as it is expected to ease the burden on smaller investors and shift the system toward taxing shareholders on their actual net gains rather than treating the gross receipts as dividends, while losses are recognized separately.

Effect on Promoters

The definition of a promoter is proposed to include anyone who holds, directly or indirectly, more than 10% in an unlisted company. No guidance is provided on whether the 10% threshold would include only direct shareholding or whether indirect and beneficial interests must also be considered. Further, there are complexities in interpreting the definition of the term "promoter" when a direct holding is by an entity with a tax-transparent status such as certain alternative investment funds ("A.I.F."), especially given that the statutory language uses the terms "directly" or "indirectly." A private equity fund set up as an A.I.F. pools capital from multiple unitholders and typically deploys such funds into unlisted companies. Given that the A.I.F. exercises control over its underlying investments rather than the unitholders, a view may be taken that an A.I.F. may be regarded as a promoter. However, since an A.I.F. is a tax transparent entity for the purpose of capital gains and the gains are chargeable to tax in the hands of its unitholders, the question of who should bear the additional tax liability becomes an important point for consideration.

Effect on Nonresident Shareholders

Under the current regime, treaty eligible shareholders faced challenges because domestic law treated buyback proceeds as dividend income while separately allowing the cost of acquisition as a capital loss, an inconsistency that opened the door to potential disputes. Thus, the current regime may still offer a limited but meaningful advantage for certain nonresident shareholders.

The proposed amendment to treat buyback of shares will simplify the taxability of nonresidents benefitting from an income tax treaty. Capital gains under the O.E.C.D. Model Convention includes alienation of any property, including shares. The phrase "alienation of property" is used to cover an extinguishment of any rights in a capital asset. Accordingly, buyback of shares should constitute an alienation of property, which could be subject to tax as capital gains under the Tax Treaty.

Further, many of India's Tax Treaties state that capital gains should be computed according to the domestic tax laws of the country where the income arises. Consequently, the classification of income will primarily follow the treatment under domestic law. Since domestic law is now being aligned with an income tax treaty, it will be easier to justify that such gains are capital gains.

For nonresident shareholders who made the investment before April 2017, the benefit of grandfathering should apply wherever allowed under a relevant income tax treaty. However, this benefit will remain subject to General Anti Avoidance Rule scrutiny. One is yet to see if the benefit of grandfathering will be extended to the additional tax payable by the promoters.

Despite this step in a positive direction, one underlying concern remains unchanged: after years of frequent shifts in the taxation of buybacks, what stakeholders continue to seek most is clarity and long term certainty.

OTHER AMENDMENTS

It is proposed to rationalize and decriminalize several penalty and prosecution provisions. As part of this shift, certain delays in filing prescribed statements or documents will now attract a fee instead of a penalty, raising an important question as to whether such fees can be litigated or whether they will be payable mandatorily by taxpayers.

In addition, the Budget proposes to advance the timing for the imposition of a penalty in cases of under reporting that are identified during scrutiny. Under the amendment, the penalty for under reported income will be imposed along with the scrutiny order itself. However, where the scrutiny is disputed, interest on the penalty amount will be levied only after disposal of the appeal by the Appellate Authorities.

In addition, the Budget seeks to rationalize prosecution provisions for specified offences including failure to deposit withholding tax, willful attempt to evade tax, and failure to furnish a return of income. A system of staggered prosecution thresholds has been introduced to align consequences with the severity of the offence, with the broader objective of reducing unnecessary criminal exposure for procedural lapses while retaining deterrence for willful violations.

FINAL THOUGHTS

In recent Budgets, the capital gains tax regime has seen frequent adjustments; however, this year the Government has chosen to retain the simplified and rationalized rate structure, signaling a period of stability after multiple rounds of change. Given global momentum around the O.E.C.D.'s Pillar Two initiative and the broader move towards a global minimum tax, there were expectations that the Budget would outline India's implementation roadmap. However, the Budget has continued to remain silent on Pillar Two.

". . . this year the Government has chosen to retain the simplified and rationalized rate structure, signaling a period of stability after multiple rounds of change."

FRENCH BUDGET 2026 – OVERVIEW OF SIGNIFICANT PROVISIONS

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Wealth Tax

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INTRODUCTION

The adoption of the French Finance Act for 2026 took place in a particularly unusual political context.

The Finance Act introduces several measures affecting private wealth structuring and investment strategies. Some provisions were expected and were discussed in previous legislative debates. Others represent more innovative approaches within the French tax landscape.

More broadly, the Finance Act for 2026 reflects a continuing trend in French tax policy: rather than reintroducing a comprehensive wealth tax on financial assets, lawmakers appear increasingly inclined to target specific structuring techniques traditionally used for wealth preservation or intergenerational planning.

METHOD FOR ADOPTING A FINANCE ACT IN FRANCE

In theory, the Finance Act is adopted with a goal of achieving a balanced budget. In practice, quite the opposite is true. A gap exists between expenditures and revenue, which is financed through borrowing.

After an informative debate usually in Spring and Summer, the government must formally file the draft Finance Bill with Parliament no later than the first Tuesday of October. Overall, the Parliament has a total of 70 days to adopt the Finance Act, and the National Assembly has the final say over the Senate. The Finance Act typically is adopted before the end of the year.

Under Article 49.3 of the Constitution, the Prime Minister can commit the government's responsibility on a bill. Unless a motion of no confidence is passed, the bill is deemed adopted without a vote. This tool can be used freely for Finance Acts. This is one reason why French budget laws can be adopted even when the government lacks a stable majority.

The budget process therefore gives the government – and to a certain extent the National Assembly – a very dominant role. What has changed recently is not the legal framework itself, but the political environment, which led to an exceptional sequence for the Finance Act for 2025 and 2026:

- An initial budget bill failed.
- A special law was adopted to allow the State to continue collecting existing taxes and to fund essential public services.

- The final Finance Act was enacted in February under Article 49.3, which is highly unusual.

The French annual budget is split between two different laws, namely (i) the Finance Act ("L.F."), which covers the State budget and most tax rules and (ii) the Social Security Finance Act ("L.F.S.S."), which covers financing the French social security system and may also contain major measures affecting social contributions.

Finance Acts are almost systematically reviewed by the Constitutional Council before promulgation. The Constitutional Council reviews both procedure (deadlines, sequencing, parliamentary rules), and substance (the budget's compliance with constitutional provisions and the validity of tax provisions). This is one reason why the Constitutional Council plays such a visible role in French tax policy. It is worth noting that taxpayers can question constitutionality of tax law after promulgation under strict conditions in the course of tax litigation.

BUDGET AT A GLANCE

Below are some key measures under the Finance Act for 2026 and the Social Security Finance Act adopted at the end of 2025.

Individuals

- Minimum income taxation of 20% extended until the French deficit is mitigated.
- Technical aspects of last year's reform on management compensation packages further refined.
- The procedure for granting of "B.S.P.C.E." (a type of warrant commonly used by start-ups) is facilitated.
- Changes are made to the tax regime applicable to furnished rentals in France by nonresidents.
- New tax status is provided for private leases ("*statut fiscal du bailleur privé*") with conditional tax allowances.
- Adjustments are made to the tax deferral regime applicable to share-for-share exchanges occurring before cash-outs through holding companies.
- A new 20% tax is imposed on certain luxury assets held through holding companies.
- Luxury assets held by companies are excluded from the "Dutreil" regime, a major tax relief mechanism for business transfers by gift or inheritance.

Businesses

- The temporary surtax for large companies is extended for an additional fiscal year.
- A possibility is provided to deduct arm's length interest paid to shareholders.

- The application of the participation exemption regime is facilitated in certain situations.
- Adjustments are made to the implementation of Pillar Two.

HOLDING COMPANIES AND PRIVATE WEALTH STRUCTURES

One of the most discussed features of the Finance Act for 2026 concerns the taxation of holding companies that are used to hold private assets. Use of private holding companies is extremely common in France for a wide range of purposes, including

- centralization of investments,
- family governance,
- intergenerational wealth transmission,
- facilitation of reinvestment, and
- financial and tax leverage.

Recent legislative initiatives suggest a growing political willingness to limit the perceived tax advantages derived from their use. The following three measures in the 2026 Finance Act illustrate this trend: (i) the creation of a new tax on luxury assets held through certain holding companies, (ii) the restriction of the Dutreil inheritance regime, and (iii) adjustments to the tax deferral regime for cash-outs through holding companies.

A New 20% Tax on Certain "Luxury" Assets Held Through Holding Companies

The Finance Act for 2026 introduces a new tax targeting certain nonprofessional assets held by holding companies controlled by individuals. This 20% tax emerged from broader political discussions on the taxation of ultra-high-net-worth individuals. Early proposals included the so-called "Zucman tax" which would have imposed a 2% annual levy on the worldwide assets of individuals whose net worth exceeds €100 million, including business assets. The government rejected that approach and instead explored an alternative mechanism: a 2% tax imposed on non-professional assets of holding companies.

During the legislative process, the Senate substantially modified the proposal by narrowing its scope to "luxury" assets and increasing the rate to 20%. The government ultimately supported these changes, and the revised mechanism was included in the final Finance Act for 2026.

This innovative new regime can be viewed as an indirect wealth tax imposed at the level of companies. Its underlying objective is to discourage the use of corporate structures to hold luxury assets while avoiding the tax burden that would normally arise if those assets were held directly by individuals.

Conditions for Application

The conditions for the tax to apply are as follows:

- The company must (i) be liable to corporate income tax or an equivalent foreign tax or (ii) be seen as a capital company even if it is tax transparent under domestic rules. The latter provision is notably aimed at L.L.C.'s in the U.S.
- The company must be controlled, directly or indirectly, by at least one individual. Control means the ownership of 50% or more of the voting rights or financial rights. It also includes the exercise of decision-making power. Control can be exercised (i) alone by one shareholder, (ii) together with one or more other shareholders acting in concert, or (iii) together with members of the same family.
- The company must predominantly derive passive income.
- The total fair market value of the private or professional assets held by the company must exceed €5 million.

Targeted Assets

Taxable assets not effectively used in an operational business activity include the following:

- Assets used for hunting and fishing
- Vehicles not used for a professional activity, as well as passenger cars within the meaning of the relevant indirect tax rules
- Yachts and pleasure boats, whether sail or motor-powered
- Aircraft
- Jewelry and precious metals, except where they are used in a museum or historic monument business or exhibited in a place accessible to the public or to employees other than offices
- Racehorses and competition horses
- Wine and spirits
- Dwellings whose enjoyment are reserved by the controlling individual, meaning homes occupied free of charge or at below-market rent, as a main residence or otherwise, as well as dwellings fictitiously rented to that person

Works of art, collectors' items, and antiques are not included in the taxable base. Conversely, the inclusion of assets used for hunting and fishing is particularly striking.

Targeted Holding Companies

The tax applies to French and Foreign holding companies.

Where the company has its seat in France, the tax is imposed on the company, itself. The tax applies regardless of the tax residence of the controlling individual. Consequently, a French company may be subject to the tax even if the controlling individual is not a French tax resident.

Where the company has its seat outside France, the tax may apply only if at least one controlling individual is French tax resident. In that situation, the tax is not levied on the foreign company itself, but on the controlling French tax resident individual. The taxable base is (i) the fraction of the value of that person's participation (ii) applied to the relevant taxable assets held by the foreign company.

In principle, two features of the tax make it more beneficial for assets to be owned by a foreign company:

- A somewhat modified principal purpose test applies.
- The total amount of the new tax and certain income taxes cannot exceed 75% of the taxpayer's income.

Practical Illustrations

- A U.S.-resident individual who controls a French S.A.S. subject to corporate income tax may trigger the tax at the level of that French company if the company meets the conditions of the regime and owns, for example, a Paris apartment made available to the shareholder or a pleasure boat not used in a genuine business. In that case, the tax is due by the French company itself, even though the shareholder is not French tax resident.
- A French tax resident individual controlling a U.S. corporation or a Delaware L.L.C. may be personally liable in France if conditions are met. In that case, the French individual is the taxpayer, and in principle, can invoke both the modified principal purpose test and the 75% income cap.

Entry into Force

The tax applies to financial years ending on or after December 31, 2026.

"The Dutreil regime is one of the most important mechanisms in the French tax system for the intergenerational transmission of family businesses."

Restrictions Affecting the Dutreil Regime

The Dutreil regime is one of the most important mechanisms in the French tax system for the intergenerational transmission of family businesses. It allows transfers of shares by gift or inheritance to benefit from a 75% exemption from transfer duties, provided that several conditions are met, including (i) a two-year collective commitment among family members to retain the shares combined with certain individual commitments of each family member to retain his or her shares for an additional four years, (ii) the continuation of a qualifying operational activity of the family business, and (iii) certain governance requirements.

The Finance Act for 2026 introduces several restrictions to this regime.

- The individual holding commitment is extended from four to six years, leading to a total minimum holding period of eight years.
- The scope of the exemption is reduced. In past, as long as the company's main activity remained operational, the Dutreil exemption applied to the entire value of the shares, including the value of assets not used in the business. The law now restricts the exemption so that the portion of the share value corresponding to specific luxury assets will no longer benefit from the Dutreil exemption unless they are exclusively used in the company's operational activity for a sufficient amount of time.

The new rules apply to gifts and inheritances occurring on or after February 21, 2026.

Tightening of Tax Deferral Regime for Cash-Outs Through Holding Companies

The Finance Act for 2026 tightens the French tax deferral regime commonly used in sale transactions involving a prior contribution of shares to a holding company.

This regime is particularly important in practice for shareholders planning a cash-out. This structure typically consists of first contributing the shares to a holding company controlled by the seller and then having that holding company sell the contributed shares to the purchaser. Hence capital gain benefits from an automatic tax deferral, provided certain conditions are met. In particular, where the sale occurs within three years following contribution, a substantial portion of the sale proceeds are required to be reinvested in qualifying economic activities. Historically, the minimum reinvestment threshold was 50%, then 60%, meaning that the balance could still be retained or invested in patrimonial assets.

The Finance Act for 2026 makes this regime more restrictive in several respects:

- The proportion of the sale proceeds that must be reinvested in qualifying economic activities increases from 60% to 70%.
- The period allowed to complete the reinvestment is extended from two years to three years following the sale, which is favorable.
- The scope of eligible reinvestments is narrowed and notably excludes a broad range of real estate activities including real estate development and property trading activities. These sectors were widely used for reinvestment purposes under the regime. By contrast, hotel and para-hotel activities remain eligible.
- The assets or shares acquired through the reinvestment must now be held for at least five years in all cases.

Those new rules apply to sales of the contributed shares carried out on or after 21 February 21, 2026, even where the prior contribution took place before that date.

INCREASE OF THE C.S.G. AND COMPLEXITY OF CAPITAL TAXATION

The Generalized Social Contribution (*Contribution Sociale Généralisée* or "C.S.G.") is a hybrid levy in France that qualifies as both tax or a social security contribution, depending on the legal context. The overall level of social contributions (which include C.S.G.) on certain types of capital income increases under the 2026 budget from 17.2% to 18.6%. However, the increase does not apply uniformly.

For example, on the one hand, the *Prélèvement Forfaitaire Unique* ("P.F.U."), a single flat-rate tax in France applied to certain savings and investment income combining a fixed rate of personal income tax and a set of social security contributions, increases from 30% to approximately 31.4%. On the other hand, rental income and real estate capital gains remain subject to the 17.2% rate, although there is some uncertainty for nonresidents.

This increase contributes to the growing complexity of the French system of taxation of capital income. In addition to income tax itself, taxable income may be subject to several additional layers of taxation, including the C.S.G., the Contribution au Remboursement de la Dette Sociale ("C.R.D.S."), and, for higher-income taxpayers, the *Contribution Exceptionnelle sur les Hauts Revenus* ("C.E.H.R."), and more recently, the *Contribution Différentielle sur les Hauts Revenus* ("C.D.H.R."). As a result, the effective marginal tax burden on certain categories of capital income can significantly exceed the headline rates often presented in public debates.

A NEW CONTRIBUTION RELATED TO THE FRENCH HEALTHCARE SYSTEM

The Social Security Finance Act for 2026 also introduces a new contribution linked to the financing of the French universal healthcare system, complementary to the already existing P.U.M.A. (*Protection Universelle Maladie*).

This measure aims to address situations in which individuals benefit from the French healthcare system while contributing only marginally, or not at all, to its financing. A typical example concerns foreign retirees who move to France and receive pension income from abroad that remains taxable exclusively in the country of source under an applicable tax treaty.

The exact parameters of the contribution remain subject to further regulatory clarification.

CONCLUSION

As mentioned at the beginning of this article, the French Finance Act of 2026 introduced several measures affecting private wealth structuring and investment strategies. As government expenditures increase and as the rate of inflation increases, it should come as no surprise that taxes must increase. The measures introduced in the Finance Act reflect the view that traditional tax planning opportunities available to high net worth individuals are being cut back and require renewed approaches.

PORTUGUESE DIVIDENDS PAID TO EUROPEAN C.I.V.'S – LOCAL LAW VS. E.U. FUNDAMENTAL FREEDOMS

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Article 22 Tax Benefits Statute
C.I.V.
C.J.E.U.
Free Movement Of Capital

INTRODUCTION

The taxation of dividends paid by Portuguese resident companies to nonresident Collective Investment Vehicles ("C.I.V.'s") has, over the past decade, become one of the most litigated and structurally significant issues in Portuguese tax law. What began as a technical discussion concerning the scope of a domestic tax exemption has evolved into a consolidated body of caselaw confirming a structural incompatibility between Portuguese tax legislation and European Union law, in particular the principle of free movement of capital enshrined in Article 63 of the Treaty on the Functioning of the European Union ("T.F.E.U.").

This article revisits the Portuguese tax regime applicable to dividends distributed to C.I.V.'s, analyses the landmark judgment of the Court of Justice of the European Union ("C.J.E.U.") in *AllianzGI-Fonds AEVN* (Case C545/19), and examines the decisive role played by the Portuguese Supreme Administrative Court in transforming a challenged legal position into settled caselaw. It further addresses the practical consequences for nonresident funds, asset managers, and custodians, including the recovery of withholding tax and indemnity interest, and reflects on the continued absence of legislative amendment despite consistent judicial intervention.

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THE PORTUGUESE DOMESTIC FRAMEWORK

Under Portuguese tax law, dividends distributed by resident companies are, as a rule, subject to Corporate Income Tax ("C.I.T.") withholding at source. In practice, however, this rule is only residually applied in a domestic context, as most corporate shareholders benefit from a full participation exemption under Article 51 of the Portuguese C.I.T. Code. For cross-border situations, article 14 of the same Code, which transposes the E.U. Parent-Subsidiary Directive into Portuguese law, provides for a full exemption from withholding tax on qualifying dividend distributions, subject to several conditions. The corporate recipient must (i) hold a minimum direct or indirect shareholding of 10%, (ii) have held the shareholding for a period of at least one year, and (iii) be subject to C.I.T. or a comparable tax.

In cross border situations falling outside the scope of Article 14, withholding tax on dividends paid to nonresident corporate shareholders may be mitigated pursuant to applicable double tax treaties. C.I.V.'s, however, are generally excluded from the participation exemption regime, which led the Portuguese legislator to introduce a specific exemption for resident funds under Article 22 of the Tax Benefits Statute. Article 22 establishes a broad exemption from C.I.T. on income obtained by C.I.V.'s, including dividends, interest, rents and capital gains, provided that such vehicles are incorporated and operate under Portuguese law. Dividends paid by Portuguese companies to resident funds are therefore not subject to withholding tax. By contrast,

C.I.V.'s established under the laws of other Member States or other countries fall outside the scope of this exemption

THE ORIGIN AND DISCRIMINATORY EFFECTS OF ARTICLE 22 OF THE TAX BENEFITS STATUTE

Article 22 of the Portuguese Tax Benefits Statute, as substantially reformed in 2015, was introduced as part of a broader overhaul of C.I.V. taxation. That reform sought to move away from taxation at fund level and to adopt an exit-based taxation model, with the stated aim of enhancing the international competitiveness of Portuguese investment funds and aligning the domestic regime with those of other European jurisdictions.

However, the manner in which the new regime was drafted resulted in the exemption being expressly limited to C.I.V.'s incorporated and operating under Portuguese law. Consequently, while resident funds benefit from a full exemption from C.I.T. on dividends received from Portuguese companies, nonresident C.I.V.'s are excluded from the scope of Article 22.

In practical terms, this legislative choice means that dividends paid by Portuguese companies to foreign investment funds remain subject to the general withholding tax rules of the Portuguese C.I.T. Code. Nonresident C.I.V.'s are, therefore, taxed at source on dividend income, typically at a 25% rate, subject only to potential mitigation under applicable double tax treaties.

This outcome gives rise to a clear case of discriminatory treatment. Resident and nonresident C.I.V.'s operate in an economically and functionally equivalent manner. In both cases, funds pool capital from multiple investors, invest in comparable financial instruments, and receive dividends generated by Portuguese companies. The place of establishment of the fund does not affect the nature of its activities, the source of the income received, or the underlying economic reality of the investment.

Despite this objective comparability, Portuguese tax law subjects nonresident C.I.V.'s to a materially less favorable tax treatment solely on the basis of residence. The decisive criterion for access to the exemption under Article 22 is not the functional characteristics of the vehicle, but its incorporation under Portuguese law. The resulting difference in treatment distorts capital allocation, increases the effective tax burden on foreign funds, and undermines tax neutrality.

THE FREE MOVEMENT OF CAPITAL UNDER EUROPEAN UNION LAW

The discriminatory effects arising from the Portuguese tax regime applicable to dividends paid to nonresident C.I.V.'s must be assessed in light of the principle of free movement of capital, enshrined in Article 63 of the T.F.E.U. That provision prohibits all restrictions on the movement of capital not only between Member States, but also between Member States and third countries, thereby conferring a particularly broad scope of protection in the field of cross border portfolio investment. This extended territorial reach distinguishes the free movement of capital from other fundamental freedoms and is of central relevance in the context of internationally diversified investment funds.

Unlike freedoms such as (i) establishment or (ii) the provision of services, the free movement of capital explicitly applies to investments made from or into jurisdictions outside the internal market. As a result, national tax measures may fall within the scope of Article 63 T.F.E.U. even where they affect investments made through funds established outside the European Union, including funds incorporated, for instance, under the laws of the United States, China, or Brazil which invest in Portuguese companies alongside funds established in the internal market. The application of Article 63 T.F.E.U. to third country situations has been consistently confirmed by the C.J.E.U. and significantly widens the potential reach of nondiscrimination claims in the area of withholding taxation.

As consistently held by the C.J.E.U., a national tax measure constitutes a restriction on the free movement of capital where it is liable to deter nonresidents from making investments in a Member State or to discourage residents from investing capital abroad. This assessment focuses on the effects of the measure rather than its formal classification, and a restriction may exist even where the legislation does not explicitly discriminate on grounds of nationality. Differential tax treatment based on residence, when applied to objectively comparable situations, is sufficient to trigger a violation of the prohibition laid down in Article 63 T.F.E.U.

"Unlike freedoms such as (i) establishment or (ii) the provision of services, the free movement of capital explicitly applies to investments made from or into jurisdictions outside the internal market."

In the specific field of dividend taxation, the C.J.E.U. has repeatedly held that dividends distributed by companies resident in a Member State to resident and nonresident recipients are derived from the same source and must, therefore, be assessed under comparable conditions. Where a Member State grants an exemption from taxation on dividends paid to resident entities while subjecting dividends paid to nonresident entities to withholding tax, that regime is, in principle, capable of restricting the free movement of capital. This is particularly so where the tax burden imposed on nonresident investors cannot be offset by a credit or refund mechanism in their State of residence.

A restriction of this nature may only be justified if it pursues an overriding reason in the public interest recognized by the C.J.E.U., such as (i) the need to ensure the coherence of the tax system, (ii) to safeguard the balanced allocation of taxing powers, or (iii) to prevent tax avoidance. Even where such an objective is invoked, the measure must be appropriate to achieve that objective and must not go beyond what is necessary. In practice, the C.J.E.U. has applied these justifications strictly, particularly in cases where the Member State itself has chosen to exempt resident taxpayers from taxation on the same income.

It is against this legal and jurisprudential framework that the Portuguese exemption regime applicable to C.I.V.'s was examined. The limitation of the exemption under Article 22 of the Tax Benefits Statute to funds incorporated under Portuguese law, combined with the taxation of dividends paid to nonresident funds, squarely raises the question of compatibility with Article 63 T.F.E.U. and sets the stage for judicial scrutiny at the European level.

THE *ALLIANZ-GI FONDS AEVN* JUDGMENT

The compatibility of the Portuguese withholding tax regime with Article 63 T.F.E.U. was definitively addressed by the C.J.E.U. in its judgment of March 17, 2022 in (Case C545/19). That decision constitutes the cornerstone of the legal analysis in

this area and provided the interpretative framework subsequently adopted by Portuguese arbitration tribunals and courts.

The case arose from a request for a preliminary ruling submitted by a Portuguese tax arbitration tribunal in proceedings brought by a German regulated investment fund. The fund received dividends from Portuguese resident companies which were subject to withholding tax at source. On the other hand, dividends paid to Portuguese resident C.I.V.'s would have benefited from a full exemption under Article 22 of the Tax Benefits Statute. The fund challenged the withholding tax on the grounds that this difference in treatment infringed the free movement of capital guaranteed by Article 63 T.F.E.U.

In its analysis, the C.J.E.U. began by addressing the issue of comparability. It held that resident and nonresident C.I.V.'S are placed in objectively comparable situations with regard to the taxation of dividends received from Portuguese companies, as those dividends derive from the same source and are subject to tax by the same Member State. The C.J.E.U. expressly rejected the argument that differences in the tax treatment of investors, or the existence of other taxes applicable to resident funds, could affect the comparability analysis. The assessment must be carried out at the level of the fund itself, which is the direct recipient of the income and the taxpayer subject to withholding tax.

The C.J.E.U. further held that a tax regime under which dividends paid to resident C.I.V.'s are exempt from taxation, while dividends paid to nonresident C.I.V.'s are subject to withholding tax, constitutes a restriction on the free movement of capital. Such a regime can reasonably be expected to deter nonresident funds from investing in Portuguese companies and, conversely, to limit the access of Portuguese companies to foreign capital. The restrictive effect arises even if the withholding tax rate applicable to nonresident funds may be reduced under a double tax treaty.

Portugal argued that the difference in treatment could be justified by the need to preserve the coherence of the tax system and by the existence of alternative forms of taxation applicable to resident funds, such as Stamp Duty levied on net asset value. The C.J.E.U. rejected these arguments, noting that there was no direct link between the exemption granted to resident funds and any corresponding tax burden imposed on those same funds. The existence of other taxes of a different nature could not justify a residence-based exclusion from an exemption applicable to dividend income.

The C.J.E.U. also dismissed arguments based on the balanced allocation of taxing powers, emphasizing that Portugal chose to exempt resident funds from taxation on dividends and could not rely on that legislative choice to justify less favorable treatment of nonresident funds. The fact that the fund at stake was established in another Member State was sufficient to bring the situation within the scope of Article 63 T.F.E.U. and to trigger a violation of the prohibition of discriminatory treatment.

Although the dispute concerned an E.U. resident fund, the reasoning of the C.J.E.U. is equally applicable to funds established in third countries. Given that Article 63 T.F.E.U. extends to capital movements involving non-E.U. jurisdictions, the principles laid down in *AllianzGI-Fonds AEVN* apply, in principle, to any nonresident C.I.V. investing in Portuguese companies, subject to the limited exceptions recognized by

the C.J.E.U. This broader relevance has been confirmed by subsequent caselaw in other Member States concerning dividend withholding taxes levied on third country investors.

The *AllianzGI-Fonds AEVN* judgment marked a decisive turning point in the challenge to the position of the Portuguese tax authorities. It removed any remaining doubt as to the incompatibility of the Portuguese regime with European Union law and converted what had previously been a challenged doctrinal issue into a clear judicial standard. This standard would soon be internalized by Portuguese courts, paving the way for the consolidation of national caselaw and the systematic refund of withholding tax unduly levied on dividends paid to nonresident C.I.V.'s.

CONSOLIDATION OF PORTUGUESE CASE LAW

Following the *AllianzGI-Fonds AEVN* judgment, Portuguese tax arbitration tribunals and courts consistently applied its principles, declaring unlawful the withholding tax levied on dividends paid to nonresident C.I.V.'s and ordering the refund of tax unduly withheld.

The decisive step towards full legal certainty was taken by the Portuguese Supreme Administrative Court, which confirmed that Article 22 of the Tax Benefits Statute, as reformed in 2015, is incompatible with European Union law insofar as it limits the exemption to funds incorporated under Portuguese law. The Court clarified that comparability must be assessed at fund level and that regulatory or investor level considerations are irrelevant.

As a result, the incompatibility of the Portuguese regime with Article 63 T.F.E.U. ceased to be a matter of doctrinal debate and became a settled point of law within the Portuguese legal system.

PRACTICALITIES: REFUNDS, INDEMNITY INTEREST, AND PROCEDURAL CHOICES

The consolidation of European and national case law has had tangible and increasingly operational consequences for nonresident C.I.V.'s investing in Portuguese companies. In practice, the controversy has shifted from (i) the existence of a substantive right to relief to (ii) the mechanics of enforcement. As right to receive dividends without the imposition of withholding tax is the rule, the choices faced by a non-Portuguese C.I.V. relate to (a) the procedural route selected, (b) the evidentiary package assembled, and (c) the ability of asset managers and custodians to support claims consistently across multiple dividend events and multiple custody chains.

At the substantive level, the claim is typically framed as the recovery of dividend withholding tax levied on a nonresident C.I.V. in circumstances where resident funds benefit from a domestic exemption. The starting point remains the general Portuguese rule that dividends paid to nonresidents are subject to withholding tax at the standard 25% rate (with an increased rate in certain cases), while treaty relief may reduce that rate provided formal requirements are met. This treaty based mitigation, however, does not address the core discrimination problem identified by the

C.J.E.U. and later internalized by Portuguese courts. In that sense, refund claims based on E.U. law operate on a different level than treaty relief and are designed to restore neutrality rather than merely cap withholding at a maximum treaty rate.

Once the substantive entitlement to restitution is accepted, the economic significance of a claim increasingly depends on indemnity interest. In 2025, the Portuguese Supreme Administrative Court clarified that, when national provisions are set aside due to incompatibility with E.U. law, taxpayers are entitled, not only to a refund of unduly withheld tax, but also to indemnity interest at a 4% yearly rate, accruing from the date of express or tacit rejection of a refund claim. This development matters because it addresses the cash economics of reclaims and reduces uncertainty around interest accrual, which had been treated inconsistently in earlier decisions. The Supreme Administrative Court's clarification also forces claimants to pay closer attention to the procedural entry point used to challenge the withholding tax, as the starting date for indemnity interest may vary accordingly.

"Even in a legal environment where the underlying incompatibility of the withholding tax regime with European Union law is firmly established, the effectiveness of a refund claim remains closely linked to its procedural framing and factual substantiation."

From a procedural standpoint, the choice of route is therefore not merely formal. One pathway is the use of an ordinary administrative claim (*reclamação graciosa*), subject to a two-year limitation period, with indemnity interest accruing from the date of express or tacit rejection of that claim. Another is the extraordinary administrative claim (*pedido de revisão oficiosa*), subject to a four-year limitation period. Under that route, indemnity interest may become due if the refund is not processed within one year from the date the claim was filed, and interest is calculated from that point onwards. In practical terms, these distinctions can materially change the overall recovery profile, particularly in portfolios where dividend distributions are frequent and claims are aggregated over multiple periods.

In this regard, tax arbitration has also become a prominent enforcement channel in Portugal. Under the Portuguese legal regime of tax arbitration, arbitration operates as an alternative jurisdictional mechanism intended to increase the speed of dispute resolution and reduce the burden on administrative and tax courts, with arbitral awards carrying the same legal force as court judgments. The procedural architecture of this regime is explicitly oriented towards speed, including a six-month time limit for the issuance of the arbitral award, subject to limited extensions, and flexible tribunal composition depending on the value of the claim.

Even in a legal environment where the underlying incompatibility of the withholding tax regime with European Union law is firmly established, the effectiveness of a refund claim remains closely linked to its procedural framing and factual substantiation. The existence of settled case law does not, in itself, dispense claimants from complying with domestic procedural rules governing limitation periods, admissibility and proof.

In this context, the evidentiary burden associated with refund claims, while conceptually straightforward, assumes practical relevance. Claimants must be able to demonstrate the receipt of Portuguese source dividends and the withholding tax levied at source, typically through documentation generated within the payment and custody chain rather than at the fund level. Where investments are held through intermediated or multilayer structures, the ability to reconstruct that chain and attribute the withholding to the relevant C.I.V. becomes decisive. Ultimately, the enforceability of rights derived from European Union law depends not only on doctrinal correctness, but also on the claimant's capacity to translate those rights into procedurally sound and adequately substantiated claims.

In short, the Portuguese dividend withholding tax reclaim debate has matured. The core legal principle is now largely settled at European and national levels, but the practical outcome of any given claim increasingly depends on procedural engineering, documentation and disciplined execution.

CONCLUSION

The Portuguese tax regime applicable to dividends paid to nonresident C.I.V.'s illustrates how well-intentioned legislative reforms may generate unintended incompatibilities with European Union law. The reform of Article 22 in 2015 sought to enhance competitiveness, yet by confining the exemption to domestic funds it introduced a residence based distinction incompatible with the free movement of capital.

It is particularly striking that, despite the volume and consistency of judicial decisions declaring Article 22 incompatible with European Union law, the provision has not yet been amended. As a result, funds adversely affected by the regime continue to be forced to resort to litigation in order to secure the refund of tax unlawfully withheld.

This case once again confirms that nonresident investors should systematically assess whether the taxation of income derived in Portugal, or in any other Member State, withstands scrutiny under the E.U. fundamental freedoms and, where appropriate, take action. From a Portuguese perspective, the experience with Article 22 of the Tax Benefits Statute demonstrates that this provision is unlikely to be an isolated instance. Other domestic tax regimes that confer more favorable treatment on resident entities, in practice, than on comparable nonresident investors may likewise struggle to survive review under the principle of free movement of capital. In this context, asset managers and fund operators cannot adopt a passive stance. A proactive and critical assessment of potentially discriminatory tax treatment has become an essential component of cross border investment governance within the European Union.

Ultimately, the Portuguese case underscores the decisive role of courts in safeguarding the effectiveness of E.U. fundamental freedoms and highlights the importance of neutrality, comparability, and legal certainty in cross border investment.

TIGER GLOBAL CASE DENIES TREATY BENEFITS CLAIMED BY MAURITIUS COMPANIES

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Tags
G.A.A.R.
India-Mauritius Income Tax Treaty
Substance Over Form
Tiger Global

BACKGROUND

Indian tax judgments continue to make global headlines. We recently contributed an article in this publication commenting on a ruling in the *Sky High* case.[1] Close on the heels of that ruling, the Supreme Court of India issued a landmark ruling in the case of three investment funds of the Tiger Global group.[2] The case involves a claim for tax exemptions in India under the India-Mauritius Income Tax Treaty.

With this Supreme Court decision, Indian tax jurisprudence once again occupies the global center stage of tax law. The decision is generating intense debate among tax professionals, multinational groups, investment funds, and all taxpayers concerned with claiming tax treaty benefits in India. More than the outcome, it seems that the observations of the judges in the decision have caused a great deal of surprise. It was widely thought that tax residency certificates ("T.R.C.'s") served as conclusive evidence for claiming benefits under the India-Mauritius Income Tax Treaty, as settled by the Supreme Court in *Azadi Bachao Andolan*[3] ("*Azadi Bachao Andolan*") and *Vodafone International Holdings BV v. Union of India*[4] ("*Vodafone*"). Interestingly, the Supreme Court relied on those decisions to arrive at a different outcome in *Tiger Global*. This demonstrates one more time that Indian tax jurisprudence must be carefully analyzed, as issues that seem straightforward at the surface level often turn out to be surprisingly complex.

In order to better appreciate the nuances of the *Tiger Global* decision, it is important to first understand the factual background of the case.

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TIGER GLOBAL ENTITIES

The three entities of the Tiger Global Group were private companies incorporated in Mauritius. They were formed to undertake investment activities aimed at long-term capital appreciation and investment income. They were regulated by the Mauritius Financial Services Commission ("F.S.C.") and held Category I Global Business Licenses under the Financial Services Act, 2007. These companies asserted that their business was wholly controlled and managed in Mauritius by a board consisting of three directors, two of whom were resident in Mauritius. The other was resident in the U.S.

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1 Abbas Jaorawala, "What Goes Around Comes Around: The Multilateral Instrument is Signed by India But is not yet Effective," *Insights* Volume 13 Number 1, p.4 (2026).

2 Civil Appeals No. 262, 263 and 264 of 2026.

3 *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1.

4 *Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613.

To emphasize their Mauritius residence and commercial and economic substance, these companies submitted that they

- met F.S.C. "commercial substance" requirements,
- maintained principal bank accounts and accounting records in Mauritius,
- had their financial statements prepared and audited in Mauritius, and
- maintained office premises with two employees in Mauritius.

The companies also held valid T.R.C.'s issued by the Mauritius Revenue Authority, which certified their status as tax residents of Mauritius for income tax purposes.

The Mauritius entities held shares in Flipkart Private Limited, a Singapore-incorporated company ("Singapore Co."), with a substantial number of shares acquired between 2011 and 2015. In turn, Singapore Co. invested in multiple Indian companies, so that the value of its shares was substantially derived from Indian assets, thereby linking the transaction to India for tax purposes under Indian tax principles. The Mauritius entities sold their Singapore Co. shares to a Luxembourg company, as part of Walmart Inc.'s broader majority acquisition of Singapore Co. from various shareholders.

Based on the T.R.C.'s, the Mauritius entities claimed benefits in India under the India-Mauritius Income Tax Treaty. In particular, they asserted that the capital gain from the transfer of Singapore Co. shares which derived their value substantially from assets in India was exempt from tax in India. The Indian tax authorities did not agree and issued certificates requiring withholding of tax on the capital gains. In response, the Mauritius entities filed applications for a ruling from the Indian Authority for Advance Ruling (the "A.A.R."). The A.A.R. reviewed the application. Based on certain observations, the A.A.R. declined to provide a ruling. In the view of the A.A.R., the applications related to transactions "*prima facie* designed for the avoidance of income-tax."

One of the pertinent observations of the A.A.R. was that the companies were controlled from the U.S. by Tiger Global Management L.L.C. ("T.G.M."), a U.S. company, along with top-level executives of the Tiger Global Group. Consequently, the A.A.R. observed that the companies did not have adequate substance in Mauritius. To elaborate on this, the A.A.R. commented that overall control and management of the Mauritius entities rested with a particular individual in the U.S. based on the following facts:

- He was authorized to have sole signatory authority over Mauritian bank accounts with regard to any transaction in excess of U.S. $250,000.
- He was named as a beneficial owner in applications for Category 1 Global Business Licenses, which is a specific regulatory status previously issued by the Mauritius F.S.C.
- He was a director and signatory of the U.S. parent.

Denied relief by the A.A.R., the three Mauritius entities petitioned the Delhi High Court for review. The companies contended that T.G.M.'s role was advisory and operational only with all decisions subject to review and final approval by their Boards.

T.G.M. had no authority to bind them or contract on their behalf without Board approval, thus preserving control in Mauritius.

The Delhi High Court allowed the appeals filed by the companies and quashed the A.A.R.'s order. The Delhi High Court thought fit to additionally hold that (i) the companies were entitled to claim benefits under the India-Mauritius Income Tax Treaty and (ii) no tax was due in India. The Indian tax authorities filed appeals before the Supreme Court challenging the High Court's decision.

SUPREME COURT FINDINGS

It is difficult to comment on each aspect of the Supreme Court's findings in an article. To put it mildly, the Supreme Court painstakingly reproduced the arguments of both sides in its decision. It has also tracked the legal background applicable to the case, including the following:

- The timeline of signing the India-Mauritius tax treaty in 1982, subsequent developments, and the amendments agreed in 2016.
- The introduction of the General Anti-Avoidance Rule (the "G.A.A.R.") in India having effect from April 1, 2017, which grandfathered investments made prior to that date.
- The rationale of binding Supreme Court decisions in *Azadi Bachao Andolan* and *Vodafone* applicable to the three Mauritius companies, considering another Supreme Court decision in the *McDowells* case.[5]
- The interplay of the T.R.C. with binding circulars of the Indian tax authorities.

What is important to note is that the core issue before the Supreme Court was whether the A.A.R. was correct in declining the advance ruling on the ground that the transactions "*prima facie* [were] designed for the avoidance of income-tax." However, since the Delhi High Court made detailed observations and provided firm conclusions in favor of the taxpayers, it appears the Supreme Court felt it necessary to comment on those aspects before providing its ruling. Accordingly, the Supreme Court identified and addressed the following two issues:

- Should the capital gains of the Mauritius companies derived from sale of Singapore company shares be exempt from tax in India under the India-Mauritius Income Tax Treaty considering (i) their substance in Mauritius and (ii) the fact that the gain arose from the value from assets located in India?
- Given that the investments were made by the Mauritius companies prior to April 1, 2017, would such investments be grandfathered from being treated as impermissible avoidance arrangements under Rule 10U of the G.A.A.R.?

In evaluating the issues, introductory comments of the judges serve as a prelude to the decision in favor of the Indian Tax Authorities.

Justice Mahadevan's expressed the following views:

[5] (1985) 3 SCC 230.

> [I]t is for the legislatures to employ their discretion to innovate through the empirical process and in line with treaty obligations, evolve new ways of tapping revenue and placing checks on new methods and devices of tax evasion that may have arisen by abuse of beneficial provisions based on treaties. Here, the Court will have to tread carefully and cautiously to ascertain whether the action of the Revenue is within the contours of law – meaning constitutional, statutory and treaty obligations – in order that fiscal difficulties are addressed by the State in line with its own fiscal wisdom and policy. * * *
>
> The India – Mauritius [Income Tax Treaty], signed in Port Louis on
>
> 24 August 1982 and effective in both jurisdictions from 1983, soon gave rise to what became known as the Mauritius Route. Investors [favored] this structure for the beneficial provisions of the treaty combined with Mauritius' domestic tax regime. While this significantly helped foreign capital inflows, it also attracted mounting scrutiny. Concerns were raised that the treaty, entered into with the intent to prevent double taxation, was being used to achieve non-taxation, particularly in respect of capital gains. Entities were incorporated in Mauritius solely to take advantage of treaty benefits. This created serious issues of treaty shopping, tax avoidance, and the integrity of the international tax system. * * *
>
> Over time, judicial and legislative responses were developed to address these challenges. After deliberations, in 2016, India and Mauritius signed a protocol providing that the [income tax treaty] would shift away from a residence-based system for the taxation of capital gains to a source-based system, to restore balance and prevent abuse. However, as global investment structures grow increasingly complex, with multi-country reach, interpretational issues continue to surface. * * *
>
> These issues have once again come before this Court in the present matter, arising out of the taxation of capital gains from the sale of shares of a Singapore-based entity deriving substantial value from its Indian operations. The transactional involvement of the relevant investment entities based in Mauritius raises significant questions as to the reach of treaty protections, the relationship between treaty provisions and domestic tax law, and the principles that must guide the grant or denial of treaty benefits. It is in this legal, economic, and policy backdrop that the dispute relating to Tiger Global needs to be considered.

Justice Pardiwala's expressed the following views:

> If one looks at the last 7-8 decades, times and periods have indeed changed. The upmanship of developed Nations over the developing or underdeveloped Nations in entering into strategic dealings and negotiations is slowly changing. Smaller Nations, Nations which are heavily import dependent, needing lot of external resources often compromise or cede many of their Sovereign rights and functions just to acquire a relationship or to connect with international trade

> or to somehow manage to keep their respective Nations as part of the international league and draw benefits in whatever way they flow and remain unmindful even if the benefits are in trickles. The choice is between a total neglect or isolation or being the company however significant or insignificant, based on the powerplay rules exercised by Nations which wield authority, influence and impact in global affairs. * * *
>
> In the case of our own Nation, each decade has shown better progressive results from the earlier decade with so much hope and promise to hold geometrical if not astronomical growth in the decades ahead of it. The respect accorded and the importance shown to our Nation is increasing by the day. We are becoming an important element in international power play, more importantly in trade and commerce. The advantage in terms of the size of the Nation, its population, and the dominating presence of youth (India has the world's largest working-age population. India will have a skilled [labor] surplus of 245 million workers by 2030) a conducive atmosphere for investment and growth, peace and stability are all now turning out to be the assets of the Nation allowing companies, entities and even individuals across the globe to come to India as a destination for future growth and progress thus making India the fourth of the fifth progressive economy in the world. * * *
>
> It is in this backdrop that one has to now understand and appreciate what is tax sovereignty and how important it is to our Nation in an era which is fraught with trade and tariff wars, building and shielding one's own economy from any international economic disorder or disaster and so on. The stability of a Nation is slowly getting determined and [recognized] based on the strength and independence of a Nation's tax sovereignty. When it comes to a domestic exercise, tax Sovereignty has to only pass through the filters of Constitutional trust, faith, and addressing the well-intended objectives of Part III and Part IV. Sovereign exercise of taxing power within a Nation is amenable to judicial review on the grounds of being unconstitutional, illegal and arbitrary and the likes of it. Whereas, exercising tax Sovereignty in the international domain has to pass through several filters which would include geo-political strengths and equations, diplomacy, making a Nation attractive for investments and at the same time, not compromising either its sovereignty or its interest and core objectives of its people.

"A careful reading of the above comments clearly indicates that the Supreme Court placed considerable emphasis on treaty abuse concerns, tax sovereignty, and the need to look through formal structures to test their real economic and commercial substance."

A careful reading of the above comments clearly indicates that the Supreme Court placed considerable emphasis on treaty abuse concerns, tax sovereignty, and the need to look through formal structures to test their real economic and commercial substance. No surprises then that the Supreme Court essentially upheld the order of the A.A.R. and overruled the decision of the Delhi High Court. The exact conclusion of the main decision is as follows:

> In our view, once it is factually found that the unlisted equity shares, on the sale of which the [three Mauritius entities] derived capital gains, were transferred pursuant to an arrangement impermissible under

> law, the [three Mauritius entities] are not entitled to claim exemption under Article 13(4) of the [India-Mauritius Income Tax Treaty]. The Revenue has proved that the transactions in the instant case are impermissible tax-avoidance arrangements, and the evidence *prima facie* establishes that they do not qualify as lawful. Consequently, Chapter X-A becomes applicable. The applications preferred by the [three Mauritius entities] relate to a transaction designed *prima facie* for tax avoidance and were rightly rejected as being hit by the threshold jurisdictional bar to maintainability, as enshrined in proviso (iii) to Section 245R(2). Accordingly, capital gains arising from the transfers effected after the cut-off date, *i.e.*, [April 1,] 2017, are taxable in India under the Income Tax Act read with the applicable provisions of the [India-Mauritius Income Tax Treaty]. The judgment of the High Court therefore deserves to be set aside."

In other words, the structure was held to be an impermissible avoidance agreement under the G.A.A.R., grandfathering was denied, and in essence, the India-Mauritius Income Tax Treaty benefit was denied to the three Mauritius entities.

COMMENTARY

This Supreme Court decision raises the following issues:

- What is the evidentiary value of a T.R.C.?
- What is the meaning of grandfathering from the G.A.A.R. for investments made prior to April 1, 2017, under Rule 10U?
- How is this decision in sync with the earlier Supreme Court decisions?

Value of a T.R.C.

The emerging view from the *Tiger Global* decision is that while a T.R.C. is persuasive proof of tax residency, tax authorities can go beyond the T.R.C. to test the substance of the participants that hold a T.R.C.

Grandfathering

Rule 10U(2) has been in existence since the introduction of the G.A.A.R. Rule 10U(2) clarifies that, while income accruing or arising to a person from a transfer of investments made before April 1, 2017, would generally be grandfathered under Rule 10U(1)(d), the G.A.A.R. would apply, irrespective of the date, to an arrangement entered into in order to achieve an abusive tax benefit or arrangement on or after April 1, 2017. The term "arrangement" is defined under section 102(1) of the Income-Tax Act, 1961, and is wide in nature.

The Supreme Court expressed the view that the G.A.A.R. was introduced to codify the doctrine of substance over form. The goal was to ensure that, for purposes of determining Indian tax consequences, the following factors are to be taken into account: (i) the real intention of the parties, (ii) the actual effect of transactions, and (iii) the purpose of an arrangement. Under the G.A.A.R., a taxpayer cannot justify an abusive transaction simply by demonstrating that its investment was made prior to April 1, 2017.

Earlier Decisions

The Supreme Court decisions in *Vodafone* and *Azadi Bachao Andolan* were issued prior to the introduction of the G.A.A.R. In *Tiger Global*, the Supreme Court referred to its earlier decision in *McDowells*, where it observed that tax planning is legitimate when conducted within the framework of law. On the other hand, colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. In view of this, it can be said that the Supreme Court, in the *Tiger Global* decision, did not overrule earlier caselaw. Rather, it provided context on how and why the facts in *Tiger Global* differed from those in *Vodafone* and *Azadi Bachao Andolan*.

PARTING NOTE

The *Tiger Global* decision clearly highlights how Indian jurisprudence is evolving in light of global events and perspectives. Substance-over-form, as a concept, continues to be the only constant in this ever-changing area of knowledge.

Whether the three Mauritius entities in *Tiger Global* will be able to successfully defend the merits of their position during an actual assessment proceeding remains to be resolved, but the odds likely are not favorable in light of observations of the Supreme Court.

On a wider stage, it would be desirable for the Indian tax authorities to consider issuing a clarification on how the decision will be applied by revenue officers during tax assessments. Among others, the validity of T.R.C.'s in general, the circumstances where challenges should be expected, and the extent of grandfathering under the G.A.A.R. would be helpful for companies and company advisers.

For now, any nonresident corporation intending to claim tax treaty benefits in India should carefully consider the impact of this decision on facts surrounding claims of economic substance. The Supreme Court has spoken, leaving it to the tax authorities to determine the dividing line between economic substance and abusive tax planning.

THE FINAL CHAPTER: TESTAMENTARY INSTRUMENTS FOR GLOBAL FAMILIES

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Tags
Ancillary Administration
Dynasty Trust
G.S.T. Tax
P.F.I.C.
Pour-Over Trust
Probate Friction

INTRODUCTION

As more families live, invest, and hold assets across multiple countries, estate planning increasingly requires coordination between legal systems that are not designed to work together. A foreign Will alone may not effectively administer U.S. assets, while a U.S. Will drafted in isolation can unintentionally disrupt an existing foreign estate plan. Although global families often focus on *inter vivos*, or lifetime, structures for generational wealth planning, testamentary planning remains equally important, particularly for families who are not prepared to transfer significant wealth during the lifetime of the parents.

One objective in cross-border estate planning is to create complementary structures globally that minimize probate friction, provide efficient tax planning for beneficiaries, and preserve the client's intended dispositive scheme across multiple jurisdictions. This article explores several key cross-border testamentary planning considerations for global families with U.S. beneficiaries and U.S. assets, as well as practical and logistical considerations for U.S. estate administration of a foreign estate.

USE OF A POUR-OVER U.S. DOMESTIC TRUST

In General

A common scenario in cross-border estate planning arises when a noncitizen, nonresident of the U.S. (an "N.R.N.C. individual") prepares a Will leaving her assets to her children upon death, one of whom is a U.S. person, as defined in §7701(a)(30) of the Internal Revenue Code ("Code").

Foreign succession law or local tax treatment may make it unfavourable for assets to pass to a beneficiary in trust. However, for a U.S. beneficiary, directing an inheritance to a U.S. domestic pour-over trust can provide efficient U.S. tax planning to complement the foreign Will or inheritance law. Because a U.S. individual's estate is subject to U.S. estate tax on worldwide assets, structuring the inheritance through a meticulously designed trust established by the N.R.N.C. individual is advantageous, as the assets passing in trust can generally be excluded from the U.S. beneficiary's own taxable estate at the conclusion of his or her lifetime. As a result, the U.S. beneficiary may preserve the estate tax exemption for personal assets that are acquired during that person's lifetime. Additionally, generation-skipping transfer ("G.S.T.") tax[1]

[1] In broad terms, G.S.T. tax is imposed when property passes from an individual or decedent to a family member that is two or more generations removed from that individual or decedent. See Code §§2601 to 2664. The archetype is a transfer from the deceased to a grandchild directly or over time through a trust.

would not be imposed when succeeding generations become entitled to receive distributions from the trust.

The pour-over trust should be drafted as revocable during the lifetime of the N.R.N.C. individual, allowing the terms to be modified by the settlor to reflect evolving estate planning objectives over the course of a lifetime. Upon the N.R.N.C. individual's death, the trust becomes irrevocable automatically and is treated as a U.S. domestic nongrantor trust for U.S. taxation purposes.[2] A properly structured trust can also offer protection from creditor claims, including those arising in the context of divorce.

The Pour-Over Trust Particulars

For a trust to qualify as a U.S. domestic trust, it must satisfy two requirements, namely (i) the Court Test and (ii) the Control Test.[3] A trust that fails to meet either test will be classified as a foreign trust for U.S. tax purposes, even if it was created under U.S. law.

It is advisable to structure the trust as a dynasty trust, meaning a trust that may continue for multiple generations under applicable law. Structuring the trust in this manner can provide the U.S. beneficiary and descendants with continued U.S. estate tax protection and creditor protection. In principle, assets remaining in the trust are not treated as the beneficiary's personal assets.

The appointment of a U.S. corporate trustee, such as a trust company, may be particularly advantageous for long-term dynasty trusts, especially if the N.R.N.C. individual does not have suitable U.S. persons available to serve in a fiduciary capacity.

To preserve flexibility for future generations of a globally mobile family, the trust instrument should grant the fiduciaries authority to migrate the trust to a foreign jurisdiction or to terminate the trust if the U.S. beneficiary ceases to be a U.S. person.[4] Consider including language such as the following:

> The Trustees may change the situs of any trust hereunder, and to the extent necessary or appropriate, move trust assets to a state or country other than the one in which the trust is then administered if the Trustees shall determine it to be in the best interest of the trust or the beneficiaries. The Trustees may elect that the law of such other jurisdiction shall govern the trust to the extent necessary or appropriate under the circumstances. Notwithstanding the foregoing, the Trustees shall first consult with tax advisors in the relevant jurisdictions prior to such change of situs in order to ensure no unacceptable adverse tax consequences would result from the change of situs under §684 of the Internal Revenue Code or otherwise.

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2 A "nongrantor" trust is considered a separate U.S. taxpayer for U.S. income tax purposes, taxed on worldwide income accumulated and realized in the trust.

3 Code §7701(a)(30)(E); see also Treas. Reg. §301.7701-7(a)(1). Generally speaking, a trust satisfies the Court Test if a court within the U.S. can exercise primary supervision over the trust administration (Code §7701(a)(30)(E)(i)). A trust satisfies the Control Test if one or more U.S. persons control all substantial decisions of the trust (Code §7701(a)(30)(E)(ii)).

4 A migration of a domestic trust to a foreign jurisdiction may be treated as a taxable transaction under Code §684.

Coordination between advisors in both the U.S. and the N.R.N.C. individual's home jurisdiction is critical. U.S. counsel should review the foreign Will which details the distribution to the pour-over trust. For example, instead of the foreign Will reading "I bequeath X% of my estate to my daughter, Z," the foreign Will could provide language similar to the following:

> I bequeath X% of my estate to the then serving Trustees of the [Name of Trust], a U.S. domestic trust created for the benefit of my child, Z, to be disposed of in all respects as a part thereof.

The pour-over trust would be annexed to the foreign Will. Counsel in the foreign jurisdiction must ensure that the pour-over trust does not cause any undesirable inheritance, probate, or other tax issues in that jurisdiction.

Additional Considerations

Additional consideration should be given to the assets intended to pass to the pour-over trust. Non-U.S. situs assets bequeathed by N.R.N.C. individuals are exempt from U.S. estate and G.S.T. taxes. Nevertheless, foreign-situs assets should be carefully reviewed by U.S. counsel and counsel in the relevant jurisdictions to identify potential adverse tax consequences.

To illustrate, an interest in a foreign company passing from an N.R.N.C. testator may be classified for U.S. tax purposes as an interest in a passive foreign investment company ("P.F.I.C."). U.S. persons, including U.S. domestic trusts, holding interests in a P.F.I.C. are subject to special tax rules and excessive tax rates under Code §§1291–1298.[5] Absent timely made elections designed to eliminate deferral of tax,[6] income and gains related to a P.F.I.C. are (i) allocated to each day in the holding period, (ii) are taxed at the highest rate of tax on ordinary income for each such year, (iii) are deemed to be paid late, and (iv) subject to the payment of interest charges each year.

The Trustees of the pour-over trust may need to act soon after receiving distributions from the foreign estate. The trust agreement may expressly authorize the Trustees to make such distributions. Alternatively, these considerations may be addressed in a separate letter of wishes encouraging coordination with qualified tax counsel in the relevant jurisdictions.

In sum, with careful planning, directing the inheritance to a pour-over trust for the benefit of a U.S. child and future generations rather than distributing the assets outright to a U.S. child provides the U.S. beneficiary with a creditor-protected and tax-efficient structure through which the inheritance may be held for generations.

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[5] A detailed discussion of P.F.I.C. planning is beyond the scope of this article.

[6] Such elections may include (i) a Qualified Electing Fund ("Q.E.F.") election under Code §1295 allowing pass-through treatment for ordinary income and capital gains, (ii) a mark-to-market election under Code §1296 with regard to marketable shares, and (iii) a purging/deemed sale election pursuant to Code §1291, under which the shareholder is treated as having sold the stock of the P.F.I.C. for its fair market value on the first day of the first taxable year in which it is a Q.E.F. and the gain is treated as an excess distribution. Future capital gains from an actual sale benefit from lower capital gain tax rates in the U.S.

A U.S. WILL

In General

N.R.N.C. individuals owning certain U.S.-sitused property at death face significant U.S. estate tax exposure due to the limited estate tax exemption afforded to persons not otherwise subject to estate tax on worldwide assets.[7] Lifetime planning is critical to address these concerns. Although such planning strategies are beyond the scope of this article, it remains an important component of any efficient cross-border plan involving U.S.-situs assets.

At the same time, important testamentary planning opportunities exist. A U.S. Will can serve as a simple yet highly effective tool to provide the N.R.N.C. decedent's family with a clear and efficient path for administering the U.S. estate.

A U.S. Will can streamline the transfer of certain assets that might otherwise be difficult to release. For example, if an N.R.N.C. decedent owned a U.S. investment account, the account generally cannot be transferred to heirs or released to a foreign executor without a transfer certificate. A transfer certificate is issued by the I.R.S. only after it is satisfied that the U.S. estate tax imposed on the N.R.N.C. individual's U.S. property has been fully paid or adequately secured.

Obtaining the certificate requires (i) the filing of Form 706-NA (United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of a Non-resident Not a Citizen of the United States) ("Form 706-NA") if the value of U.S. situs assets exceeds the applicable estate tax exemption filing threshold or (ii) the submission of an affidavit and supporting documentation if the value falls below that threshold.

"A U.S. Will can serve as a simple yet highly effective tool to provide the N.R.N.C. decedent's family with a clear and efficient path for administering the U.S. estate."

Preparing and submitting the required documentation can be time consuming and costly, and families may wait more than one year after submission for the certificate to be issued. A transfer certificate is not required if the U.S. estate assets are administered by an executor or administrator who is duly appointed, qualified and acting within the U.S.[8] Use of a U.S. fiduciary eliminates the need for a transfer certificate because the fiduciary assumes the liability for unpaid estate tax in the event of the impermissible transfer of assets. Of course, even with a U.S. fiduciary appointed, any applicable U.S. estate tax must be paid.

From a practical perspective, administering an N.R.N.C. individual's U.S. estate through a separate U.S. Will also streamlines the court administration process. A U.S. Will that specifically governs the disposition of the testator's U.S. situs assets allows U.S. probate courts to proceed more efficiently. In practice, courts generally process U.S.-style Wills more quickly than foreign Wills and substantially faster than foreign estates administered without a Will. As discussed below, administration of a foreign estate without a U.S. Will in place presents numerous challenges.

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7 Each N.R.N.C. individual has an estate tax exclusion of $60,000. This amount is not indexed for inflation. Generally, the first $1,000,000 of taxable value will be taxed at graduated rates totaling $345,800. Thereafter, the estate tax is imposed at a flat 40% rate. There are certain seemingly U.S. situs assets that are treated as having a foreign situs, and for that reason are not subject to estate tax. See generally Code §2105. In certain circumstances, a U.S. tax treaty may apply that permits a higher exclusion amount against estate tax or gives primary taxing authority to the country of domicile.

8 Treas. Regs. 20.6325-1(c).

The U.S. Will Particulars

The Will must govern U.S. assets only. Consider including language such as the following:

> I, [Name of Testator], a citizen and domiciliary of Country X, declare this to be my Will, relating, however, only to those assets that have situs within the United States, revoking all prior Wills and Codicils thereof that relate to such assets made by me at any time previously.

The Will must direct probate to a particular U.S. state for its courts to exercise jurisdiction. While such a direction does not guarantee that a court will accept jurisdiction, considerable weight is often given to the testator's expressed preference, particularly where a meaningful nexus to the state exists. It is advisable to select a state in which the nominated executor resides or where the U.S. situs property is located. Consider including language such as the following:

> This Will shall only affect the disposition of my probate assets located within the United States. I request that this Will be admitted to probate in the Probate Court of [XYZ] County of the State of [ABC] and that my estate under this Will be administered as far as may be practicable in such state. I direct that all provisions of this Will, including, without limitation, all dispositive provisions in respect of my property situated within the United States and any real property situated within the State of [ABC], be governed by and construed under the laws of such state and my fiduciaries possess all discretionary and other powers provided under such laws.

Caveat

The U.S. Will and the Will in the N.R.N.C. individual's home jurisdiction cannot contain conflicting provisions. Because Wills dispose of a testator's assets wherever situated, ambiguity may arise as to which instrument governs U.S.-situs property. Accordingly, the U.S. Will should expressly apply to U.S. assets only, as described above, and the foreign Will should be written to refer to property wherever situated, other than in the United States. Proper planning of the U.S. and foreign Wills promotes clarity and consistency across the testator's global estate plan.

ORIGINAL & ANCILLARY ESTATE PROCEEDINGS

At the conclusion of an individual's lifetime, a decedent's estate is generally administered in the country of domicile through probate of a Will or pursuant to applicable succession laws. When an N.R.N.C. decedent owned U.S. situs assets at the time of death, a separate U.S. estate administration proceeding is often required before those assets may be transferred to a foreign executor[9] or to the decedent's heirs.

The form of U.S. administration depends largely on the proceedings conducted in the decedent's country of domicile. If no formal estate proceeding occurred abroad, an original estate administration may be commenced in the U.S. When a foreign

[9] As used in this section, the term "executor" includes comparable fiduciary roles, including a personal representative or an administrator, the latter typically being a fiduciary appointed to administer an estate where no Will exists.

probate or inheritance proceeding has taken place and a fiduciary was appointed, the foreign executor may instead seek ancillary administration. Ancillary administration is a secondary estate proceeding initiated in a jurisdiction other than the decedent's domicile that enables a foreign executor to administer assets located in the jurisdiction by obtaining recognition of the foreign estate settlement.

As discussed above, a separate U.S. Will can streamline U.S. administration of an N.R.N.C. decedent's estate. Absent such planning, original or ancillary proceedings often involve additional procedural complexity. Often, they arise due to differences in identifying the person having authority to act on behalf of the estate. In many jurisdictions outside of the U.S., authority vests directly in the heirs as statutory successors rather than in a court-appointed fiduciary. As a result, U.S. courts often require legal opinions from foreign counsel explaining the applicable succession system to confirm the individual or individuals who are authorized to act in the U.S.

At a minimum, a foreign executor must provide to the U.S. probate court authenticated documentation that must be notarized and apostilled. Examples include the death certificate, the foreign probate record when applicable, and the petition to the court for original or ancillary administration. Depending on the U.S. jurisdiction, appointment of a U.S. co-executor may also be required.

Once appointed, the executor must marshal and administer U.S. assets, satisfy applicable debts and expenses, obtain any required transfer certificate, and, if applicable, file Form 706-NA and pay any U.S. estate tax due. Practical challenges may arise when U.S. assets must be liquidated and deposited into a U.S. estate bank account. In recent years, some financial institutions have expressed reluctance to onboard non-U.S. fiduciaries. In some cases, foreign executors resign in favour of a U.S. fiduciary for logistical ease.

CONCLUSION

There are many considerations involved in designing a testamentary plan, particularly where assets and beneficiaries span multiple jurisdictions. Thoughtful planning can ease the administrative burden on a decedent's family and help ensure that a testator's intentions are carried out as originally expected. One of the most valuable gifts a testator can provide to heirs is a coordinated testamentary plan in which instruments executed in several jurisdictions work together to facilitate administration, preserve intent, and transfer wealth to the next generation in a timely and tax-efficient manner.

About Us

Ruchelman P.L.L.C. is a boutique law firm based in New York City. It was founded in 1989 by an alumnus of a legacy firm that is now Deloitte's.

Our firm provides a wide range of tax planning and commercial legal services to clients across the Americas, Asia, Europe, and the Middle East. Clients include global investors, multinational corporations expanding into the U.S., and U.S. businesses with international operations. Our core practice focuses on cross-border transactions.

About Insights

Insights, the tax journal of Ruchelman P.L.L.C., provides in-depth reporting on the evolving landscape of U.S. and international taxation. It offers complex analysis of current issues, legislative updates, and practical introductions to the tax law from leading tax professionals in their respective countries.

Special features include an annual examination of the use of holding companies in European tax planning and a look at the year in review.

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